D.P.U. 94-DS-6

Adjudicatory hearing in the matter of possible violation of G.L. c. 82, §40 by Francis Venuto, Jr., Franny's Landscaping Co., Inc., Framingham, Massachusetts.

---

APPEARANCES: Francis A. Venuto, Jr., President
Franny's Landscaping Co., Inc.
Framingham, Massachusetts 01701
PRO SE
Respondent

Gail J. Soares, Dig-Safe Investigator
Division of Pipeline Engineering and Safety
Department of Public Utilities
Boston, Massachusetts 02202
FOR: THE DIVISION OF PIPELINE
ENGINEERING AND SAFETY

I. INTRODUCTION

On September 20, 1994, the Department of Public Utilities ("Department") Pipeline Safety and Engineering Division ("Division") issued a Notice of Probable Violation ("NOPV") to Franny's Landscaping Co., Inc. ("Respondent" or "Franny's"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations on July 13, 1994, on 236 Ash Street, Reading, Massachusetts, in violation of G.L. c. 82, §40 ("Dig-Safe Law"). The NOPV stated that the Respondent failed to tender proper notification to Boston Gas Company ("Company"), and failed to exercise reasonable precautions during excavation, causing damage to an underground gas main operated by the Company. The NOPV indicated that the Respondent had the right to appear before a Division hearing officer in an informal conference on October 18, 1994 at the Department's offices, or send a written reply by that date.

By letter dated October 28, 1994, the Respondent filed a response to the NOPV alleging that the work which resulted in the damage was performed by the Respondent under the direction of Major Construction Management Corp. ("Major Construction"), the general contractor at the site, and that Franny's was trying to obtain Major Construction's Dig-Safe number on this project.

On January 13, 1995, the Division issued an informal decision, finding that the Respondent was not working under a valid Dig-Safe number. The Division obtained a copy of a Dig-Safe ticket issued to Major Construction, but this Dig-Safe ticket was issued for numbers 230, 240, and 242 Ash Street and the damage occurred at number 236 Ash Street. Therefore the Division found that the Respondent violated the Dig-Safe Law. The Division also found that this was a repeat offense. In its decision, the Division informed the Respondent of its right to request an adjudicatory hearing before the Department. The Respondent was dissatisfied with the informal

decision and on January 18, 1995 requested an adjudicatory hearing before the Department. After due notice, an adjudicatory hearing was held on March 29, 1995, pursuant to 220 C.M.R. §§ 99.00 et seq.

At the hearing, Gail Soares, a Dig-Safe investigator, appeared on behalf of the Division. James Giles, a special representative in the Company's Legal Services Department, and William McCarthy, a district supervisor in the Company's Distribution Department, testified on behalf of the Division. Francis A. Venuto, Jr., president of Franny's, testified for the Respondent. The Division offered the following exhibits as evidence: Division Exhibit 1 includes a November 30, 1994 NOPV from the Department to Major Construction; Major Construction's December 5, 1994 letter of reply; and a Dig-Safe ticket dated April 4, 1994 for 230, 240, and 242 Ash Street in Reading. Division Exhibit 2 includes a letter from Franny's, dated January 18, 1995, requesting an adjudicatory hearing; the Department's NOPV of September 20, 1994, noting that this was a repeat offense carrying a civil penalty of $500.00; the Respondent's reply letter of October 28, 1994 to the Department's September 20, 1994 NOPV; the Department's November 30, 1994 letter acknowledging receipt of the Respondent's October 28, 1994 reply; the Department's report of the Dig-Safe violation dated October 30, 1994; the eleven-page original damage notification from the Company; the Dig-Safe ticket for 230, 240, and 242 Ash Street in Reading dated April 4, 1994; a two-page printout of Dig-Safe numbers pulled for Ash Street; and the informal decision of January 13, 1995 from the Department to the Respondent. All exhibits offered were moved into evidence by the Department.

## II. SUMMARY OF FACTS

### A. The Division

The Division argued that the Respondent violated the Dig-Safe Law by failing to tender proper notification during renovation to an existing building and installation of telephone lines at 236 Ash Street, which resulted in damage to an underground gas line ( Exh. Div.- 2, at 2-4; Tr. at 3-4). While the Division raised the issue of the Respondent's failure to exercise reasonable precautions in the NOPV, the Division did not address the issue at the hearing.

Regarding the issue of lack of proper notification, Ms. Soares testified that in correspondence between the Division and Franny's, the Respondent had stated that it believed that Major Construction had obtained a Dig-Safe ticket for the area and that therefore Major Construction should have been responsible for the damage that occurred at 236 Ash Street in Reading (Tr. at 12-13). Ms. Soares testified that the Department pulled any Dig-Safe tickets that were attributed to Major Construction for the area and the only tickets that appeared were for the numbers 230, 240, and 242 Ash Street (Exh. Div.-2, at 16; Tr. at 13). She testified that the damage occurred at 236 Ash Street (Tr. at 13). Ms. Soares presented a two-page computer run of Dig-Safe numbers showing that there was no number pulled for the July 13, 1994 excavation at 236 Ash Street address (Exh. Div.- 1, at 19-20).

Regarding the issue of Franny's responsibility for the damage, there was evidence that Franny's was: (1) the registered owner of the backhoe that caused the damage, and (2) identified as the operator of the backhoe at the site (Exh. Div.-2, at 8, 14). In support of the Division's position, Mr. Giles testified to the existence of a damage notification provided to the Company of a Dig-Safe violation which indicated that the equipment that caused the damage was operated by the Respondent (Exh. Div.-2, at 8; Tr. at 7). Mr. McCarthy stated that following the incident, he interviewed James H. Blomley, Assistant to the General Manager of Reading

Municipal Light Department, who identified the Respondent as the contractor who was doing the work when the damage occurred (Exh. Div.-2, at 14; Tr. at 9 ).

Ms. Soares testified that this was the Respondent's second offense, and that on September 25, 1992, the Respondent had paid a fine of $200.00 for a prior violation that occurred in Brighton, Massachusetts on June 5, 1992 (Tr.at 21).

B. The Respondent

The Respondent maintains that he was performing landscape construction for Major Construction when the damage occurred (id. at 13-14). According to the Respondent, Major Construction's foreman at the site of the landscaping had asked the Respondent to help out in excavating the back parking lot (id. at 14). Mr. Venuto stated with respect to Dig-Safe, he always asks if there is a Dig-Safe number when requested to do digging outside of his normal task and that in this instance, he was reassured by the superintendent of Major Construction that it "had a [Dig-Safe] number on file" (id. at 14-15).

Mr. Venuto stated that he relied on the representation made by Major Construction that a Dig-Safe number had been obtained, and went ahead with the excavation, even though he admitted that he should have pulled his own Dig-Safe number for that job (id. at 15). Mr. Venuto did not deny that his company was operating as an independent contractor during the events that led to the damage (id. at 17-18).

Mr. Venuto testified that the backhoe that caused the damage was not owned by his company, but by another subcontractor, Labadini Tree and Landscape Company ("Labadini"), whom he had hired for the day to dig the trench line (id. at 15). Mr. Venuto testified that Labadini was operating the machine at the time the damage occurred (id.). Mr. Venuto stated

that he was aware of the fact that "we did dig up a gas line" (id. at 16).

III. STANDARD OF REVIEW

G. L. c. 82, § 40, states in pertinent part:

> No person shall, except in an emergency ... contract for, or make an excavation ... unless at least seventy-two hours, exclusive of Saturdays, Sundays and legal holidays, but no more than thirty days, before the proposed excavation is to be made such person has given initial notice in writing of the proposed excavation to such natural gas pipeline companies, public utility companies, cable television companies and municipal utility departments as supply gas, electricity, telephone or cable television service in or to the city or town where such excavation is to be made. Such notice shall set forth the name or the street or the route number of said way and a reasonably accurate description of the location in said way or on private property the excavation is to be made ...

The statute is clear and unambiguous. Any company, contractor or person must properly notify the appropriate operators of underground utilities at least 72 hours before beginning an excavation. See Industrial Contractors and Developers, D.P.U. 86-DS-25 (1988); John Farmer, D.P.U. 86-DS-102 (1987); Thomas Hart, D.P.U. 93-DS-43 (1994).

The same statute also states:

> Any such excavation shall be performed in such manner, and such reasonable precautions taken to avoid damage to the pipes, mains, wires or conduits in use under the surface of said public way ... including, but not limited to, any substantial weakening or structural or lateral support of such pipe, main, wire, or conduit, penetration or destruction of any pipe, main, wire or the protective coating thereof, or the severance of any pipe, main or conduit.

The term "reasonable precautions" is not defined in the statute or the Department's regulations, nor do regulations specify approved conduct. Instead, case precedent has guided the Department in the Dig-Safe area.

In order for the Department to construct a just case against an alleged violator of the Dig-Safe Law for failure to exercise reasonable precautions, adequate support or evidence must accompany that allegation. New England Excavating, D.P.U. 89-DS-116, at 9 (1993); Fed.

Corp., D.P.U. 91-DS-2, at 5-6 (1992). In specific instances where there has been an allegation of failure to exercise reasonable precautions without demonstrating any precautions the excavator could or should have taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Umbro and Sons Construction Co., D.P.U. 91-DS-4 (1992); Fed. Corp., D.P.U. 91-DS-2 (1992); Albanese Brothers, Inc., D.P.U. 86-DS-24 (1990). See also Yukna v. Boston Gas Company, 1 Mass. App. Ct. 62 (1973).

For example, several cases have established the proposition that using a machine to expose utilities, rather than hand digging, constitutes failure to exercise reasonable precautions. See Eastern Edison Co., D.P.U. 93-DS-21 (1994); Cairns and Sons, Inc., D.P.U. 89-DS-15 (1990); Petricca Construction Co., D.P.U. 88-DS-31 (1990); John Mahoney Construction Co., D.P.U. 88-DS-45 (1990). However, in Fed. Corp., hand digging to locate facilities was found to be impossible, and use of a backhoe was found to be reasonable when the Division failed to set forth a reasonable alternative the excavator could have taken to avoid damage. Fed. Corp., D.P.U. 91-DS-2 (1992).

In cases where an excavation has been delegated, the Department has found that while the performance of the excavation may be delegated, the obligation to ensure that the work is performed in accordance with the law cannot be delegated. See Albanese Brothers, Inc., D.P.U. 86-DS-24, at 7 (1990). Furthermore, the Department has held that this obligation to notify applies to all persons named by the terms of the statute including contractors and subcontractors. Reynolds Construction Co., D.P.U. 87-DS-47, at 7 (1990). The Department has held that the statute clearly attaches liability for a violation regardless of whether a party directly excavates or contracts for the excavation to be performed (id.). The statute imposes an obligation on the

contractor to provide Dig-Safe notice. In re Malta, D.P.U. 88-DS-44, at 3 (1990). Albanese Brothers, supra at 5-6.

## IV. ANALYSIS AND FINDINGS

The issues raised in this case are: (1) whether the Respondent violated the Dig-Safe Law by failing to tender proper notification to Dig-Safe prior to excavation; and (2) whether the Respondent violated the Dig-Safe Law by failing to exercise reasonable precautions during excavations. A threshold question is whether the Respondent is the agent responsible for these obligations under the Dig-Safe Law.

Regarding the threshold issue of agency, while there is conflicting testimony as to the ownership of the equipment that caused the damage and who was operating the equipment, G.L. c. 82, § 40 applies to those who perform an excavation themselves or contract for an excavation. See In re Malta, D.P.U. 88-DS-44, at 3 (1990); Albanese Brothers, supra.

Franny's was an independent contractor performing landscape work for Major Construction. When asked to do the excavation at issue to accommodate Major Construction, the Respondent contracted with Labadini to perform the excavation. Even though Labadini is an independent contractor, the common law defense on that basis raised by the Respondent cannot prevail in the face of the duty imposed on the Respondent by the statute. The Department therefore finds that Franny's was the agent responsible for the conduct of the excavation under the requirements of the Dig-Safe Law.

Regarding the issue of proper notification, it is clear from the record that the Respondent did not obtain a Dig-Safe number. The Respondent testified that he relied on the representation from Major Construction that a Dig-Safe number had been obtained. The Division presented

documentary evidence and testimony that the damage occurred at 236 Ash Street. The Division also presented documentary evidence that Dig-Safe numbers had been pulled for 230, 240, and 242 Ash Street but not for 236 Ash Street. Moreover, the Respondent admitted that he should have obtained his own Dig-Safe number, but failed to do this. Therefore, the Department finds that the Respondent failed to tender proper notification prior to the excavation.

The second issue involves whether the Respondent took reasonable precautions to protect underground facilities during the excavation. The Division's contention is that damage occurred and therefore, the Respondent failed to exercise reasonable precautions. However, the Division failed to provide examples of precautions which the Respondent might have or could have taken to protect underground facilities. Where there has been an allegation of failure to take reasonable precautions without demonstrating any precautions that could or should have been taken, the Department has found that the mere act of damage will not be sufficient to constitute a violation of the statute. See New England Excavating, supra; Umbro, supra; Fed. Corp., supra; Albanese Brothers, supra; In re Fiore & Aenone, Inc., D.P.U. 88-DS-11 (1993). The Department finds that the Division failed to show that the Respondent did not take reasonable precautions in the excavation.

Finally, the Division presented testimony and documentation that this was a second offense for the Respondent, which subjects him to a $500.00 civil penalty under G.L. c. 82, § 40.

V. ORDER

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That Franny's Landscape Co., Inc., violated the Dig-Safe Law by failing to tender proper notification prior to excavation at 236 Ash Street in Reading on July 13, 1994; and it is

ORDERED: That Franny's Landscaping, Inc., as a second-time offender under the Dig-Safe Law, shall pay a civil penalty of $500 to the Commonwealth of Massachusetts by submitting

a check or money order in that amount to the Secretary of the Department of Public Utilities, payable to the Commonwealth of Massachusetts, within 30 days of this Order.

By Order of the Department,

_____
Kenneth Gordon, Chairman

_____
Mary Clark Webster, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).